

1                                   **BEFORE THE SHORELINES HEARINGS BOARD**  
2                                   **STATE OF WASHINGTON**

3   **BARBARA S. & MICHAEL N. MALLIS,)**

4                                   **Appellants,)**

**SHB No. 92-42**

5                                   **v.                                  )**

6   **LEWIS COUNTY and STATE OF)**  
7   **WASHINGTON DEPARTMENT OF)**  
8   **ECOLOGY,                                  )**

**FINAL FINDINGS OF FACT,**  
                                  **CONCLUSIONS OF LAW**  
                                  **AND ORDER**

9                                   **Respondents.                                  )**  
10                                   **\_\_\_\_\_)**

11           This matter came on for hearing before the Washington State Shorelines Hearings  
12   Board on December 21, 1992, in the Board's office, Lacey, Washington, and on February 2,  
13   1993, in the fire hall, Ashford, WA.

14           On December 21, 1992, Board Members in attendance were Presiding Annette S  
15   McGee, Chairman Harold S. Zimmerman, Attorney Board Member Robert V. Jensen, David  
16   Wolfenbarger and Robert Patrick. The same members with the exception of Robert Patrick  
17   were in attendance on February 2, 1993. The February 2 proceedings were taped and Mr.  
18   Patrick reviewed the record.

19           Lenore E. Schatz, Court Reporter with Gene Barker & Associates, Olympia, WA,  
20   recorded the December 21, 1992 proceedings, and Louise Becker, also a court reporter with  
21   Gene Barker & Associates, recorded on February 2, 1993.

22           The matter is a request for review of a joint Lewis County (County), Washington State  
23   Department of Ecology (DOE) Order and Civil Penalty Number DE 91-SH-181 in the amount  
24   of one-thousand dollars (\$1,000) issued to Mike Mallis and dated November 15 and  
25

26   **FINAL FINDINGS OF FACT,**  
27   **CONCLUSIONS OF LAW AND ORDER**  
      **SHB NO. 92-42**

(1)

1 November 19, 1991.

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3 Appearances were as follows:

- 4 1. Appellant Michael Mallis, pro se;  
5 2. Respondent DOE, Assistant Attorney General, Rebecca A. Vandergriff;  
6 3. Respondent Lewis County, Prosecuting Attorney, Eugene Butler; and  
7 4 On February 2, 1993, Siri C. Nelson representing the U.S. Corps of Army  
8 Engineers' witness.

9 Witnesses were sworn and testified Exhibits were examined. Four Board Members  
10 viewed the site on February 2, 1993, in the company of parties, and Patrick viewed the site at  
11 a later date.

12 From the testimony heard and exhibits examined, the Shorelines Hearings Board makes  
13 these

## 14 FINDINGS OF FACT

### 15 I

16 Michael and Barbara Mallis own a residence and property in Paradise Estates No. 3,  
17 Section thirty-six, TWP 15N, R6E, W M. in Lewis County, State of Washington, which is  
18 Lot Number 351, on Paradise Drive.

### 19 II

20 In the early part of July, 1991, Jim Anest, Enforcement Coordinator for the Shorelines  
21 Division of DOE received two separate telephone calls from two citizens explaining their  
22 concern over what they thought was an illegal bulkhead constructed along Big Creek on  
23 residential lot, number 351, in Paradise Estates, in Lewis County.

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### III

Anest contacted Lewis County Planning Manager Michael Zengel and found that Lewis County had no application for a shoreline permit for the project. Zengel had also received the complaints.

### IV

Zengel visited the site and found quarry rock cemented together with steps leading to the water and a concrete walkway along the edge of the lot, next to the water, following the contour of the Creek.

### V

Zengel issued a Lewis County Order to Mallis, dated June 20, 1991. The Order was to cease and desist and to remove the rock and concrete bulkhead within forty-five (45) days.

The Order stated that Mallis had placed a landfill behind a bulkhead within the floodway and beyond the ordinary high water mark (OHWM).

### VI

On July 31, 1991, Zengel again visited the site with a Lewis County Building Official, who had expertise in stream bank erosion and flood control, and a Soil Conservation Service official.

### VII

It was determined by Lewis County based on an old photograph taken of the property from upstream and the July site visit that there was a previous rockery causing a protrusion along the bank that had been placed there sixteen to seventeen years before by a former lot owner; that the new structure was substantially in the same position as the previous structure at approximately the same elevation; and they also found that some ground cover had been disturbed by the removal of a stump.

VIII

A Lewis County Amended Notice of Required Corrective Action dated August 1, 1991, was issued to Mallis. The order called for:

1. *One (1) truckload of normal rip rap rock, as defined by the Soil Conservation Service, shall be placed at the upstream end of the subject bulkhead in that area where the apparent removal of a stump resulted in the removal of existing ground cover in order to protect that area from erosion caused by flood waters. This requirement shall be accomplished within thirty (30) days of the receipt of this order.*

2. *By April 1, 1991, willow cuttings shall be planted within the area to be protected by the load of rip rap rock. The spacing of such cuttings shall conform to the recommendations of the Soil Conservation Service. Note: This date should have read 1992.*

3. *You shall acquire all the necessary federal, state, and local permits or authorizations along with any other permission required to complete the project. This shall specifically include a Hydraulics Project approval from the Washington State Department of Wildlife and the authorization of any other property owner involved, if any.*

*. . . failure to comply with the terms of the amended order can result in further enforcement action . . .*

IX

On August 15, 1991, Anest from DOE conducted his own site visit and observed the structure in question, which he described as approximately sixty (60) feet in length and six (6) to eight (8) feet wide along the creek bank, with a concrete walkway along the length of the lot and steps located about in the middle leading to the water.

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2 X

3 Anest concluded that Mallis brought in two truck loads of rock, and that the project he  
4 had observed was a substantial development, within two hundred feet of Big Creek, a shoreline  
5 of the state, and that it needed a shoreline permit or exemption. Anest also concluded that the  
6 project consisted of fill, because the rock was different color than found on the banks, had no  
7 weathering effect, and was not in character with the other lots on Big Creek in Paradise  
8 Estates.

9 XI

10 Anest talked to Mallis about the matter to see if it could be resolved without an Order  
11 from DOE. A resolution was not reached.

12 XII

13 Anest explained to Zengel what his conclusions were. The DOE and Lewis County  
14 then issued Joint Order and Civil Penalty Number 91-SH-181, dated November 15 and 19,  
15 1991. The penalty was in the amount of one thousand dollars (\$1,000) and Mallis or his agent  
16 was ordered to cease and desist from all further construction within two-hundred (200) feet of  
17 the ordinary high water mark of Big Creek, unless authorized by a valid Lewis County  
18 Shoreline Permit with DOE approval. The Order also included a clause for Mallis to respond  
19 within twenty (20) days to the allegations listed and for him to submit a plan within thirty (30)  
20 days for restoring the site to the maximum extent feasible.

21 XIII

22 Order and Civil Penalty Number 91-SH-181 also stated: "If all of the requirements,  
23 terms and conditions of this order are satisfied in a timely manner by Mike Mallis, this penalty  
24 will be waived in full. . . .".

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2 XIV

3 On December 19, 1991, Michael Mallis applied to the DOE and Lewis County for  
4 relief from the penalty and an appeal to the allegations.

5 XV

6 A Notice of Disposition dated July 20, 1992, seven months after the application for  
7 relief, DOE affirmed Order and Civil Penalty Number 91-SH-181.

8 XVI

9 The appeal of the Order Number 91-SH-181 and Disposition was filed with the  
10 Shorelines Hearings Board on September 3, 1992, which is the subject of this hearing.

11 XVII

12 William J. and Carol Kloida, former owners, purchased Lot Number 351 in 1973 and  
13 sold it to Mallis in 1990.

14 XVIII

15 Mr. Kloida dug round river rock from his property and placed them in the bank by the  
16 Creek to protect the bank from washing out. These rocks were five (5) to twenty-four (24)  
17 inches in size and held in the bank by dirt. He also constructed three or four steps about in the  
18 middle leading to the water.

19 Kloida testified that the original slope of the bank was at about a forty five (45) degree  
20 angle.

21 There was a small tree by the steps and other vegetation between the rocks and along  
22 the bank.

23 XIX

24 Kloida contends that the present structure does not extend out into the water any farther  
25 than the original rock that he had placed along the bank when he owned the property.

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2 XX

3 Some of the neighborhood witnesses agreed with Klolda about the existing rockery and  
4 the slope of the bank, while other neighborhood witnesses testified to a gentle slope to the  
5 water with grass and other vegetation.

6 Among those testifying that the back yard sloped to the Creek, was Sharon Salano, who  
7 had lived on the Mallis property from early 1985 to July, 1986.

8 XXI

9 Washington State Wildlife Agent Chris Anderson's opinion was that the project  
10 extended into the OHWM and constituted a hydraulic violation, but he did not issue a citation  
11 because DOE was asking for restoration of the bank. He had never been on the property prior  
12 to this project nor did he offer any proof for his opinion, other than he could tell it extended  
13 into the OHWM by looking at adjacent properties.

14 XXII

15 There is no dispute that Mr. and Mrs. Mallis had the project in question constructed  
16 without a permit from Lewis County.

17 The Mallises contend that they did not know a permit was required to repair an existing  
18 structure that was being undermined by the Creek causing the existing rocks to become loose  
19 and dangerous.

20 XXIII

21 The Mallises also contend that the project was repair of an existing rockery, that  
22 extends no farther waterward than the original one, while DOE calls the project  
23 "Reconstruction and Alteration" and that it extends farther waterward than the old structure.

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2 XXIV

3 The Mallis's granddaughter fell on a loose rock, and a fisherman slipped into the  
4 stream. Therefore, Mallis talked to a friend, Bob Thayer, about what they thought was a  
5 safety and liability problem. The Mallises contend that the new structure is necessary to  
6 stabilize the loose rocks, as well as to protect their property.

7 XXV

8 Thayer agreed to repair the existing rockery in May, 1991, for an in kind payment of  
9 one-half of a side of beef.

10 XXVI

11 Thayer is a truck driver by trade, but had owned a landscaping business from 1978 to  
12 1983. He had never worked previously within the shoreline and did not know that a permit  
13 was required for this project.

14 XXVII

15 When Thayer started digging into the bank he found round rocks with concrete mixed  
16 in between them. No other witnesses corroborated his testimony about concrete mixed in with  
17 the rocks.

18 XXVIII

19 Thayer was instructed by Mallis to make the rockery safe and to follow the natural  
20 contour of the shoreline.

21 XXIX

22 Thayer brought in two (2) twelve (12)-ton truckloads of large rock for the project, but  
23 gave approximately three (3) or four (4) tons to a neighbor, because he didn't need all of it.  
24 He testified that he moved some of the old rocks to make the current structure have a stepped  
25 vertical appearance.



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2 XXX

3 Thayer was never in the water at anytime, and he placed the rocks in the bank by a  
4 chain attached to a back hoe located in the Mallis yard. He completed the project by placing  
5 crushed rock behind the large boulders; used cement that he mixed in a wheelbarrow on site to  
6 bind the rocks together; used crushed rock to make a two (2) inch cap; repaired the steps; and  
7 made a walkway at the top of the bank edge, following the contour of the land

8 XXXI

9 Mallis admitted that the estimated total cost of the project had a fair market value  
10 between two thousand, five hundred dollars (\$2,500) to three thousand, three hundred dollars  
11 (\$3,300), even though it did not cost him this much in actual dollars.

12 XXXII

13 After hearing the testimony on February 2, 1993, Zengel took the stand at the close of  
14 the second day of the hearing. He commented that based on the evidence heard that day, he  
15 currently thinks the structure is no farther waterward than the original structure.

16 Zengel also stated that the FEMA maps showed a slight bulge in the area compared to  
17 the adjacent properties.

18 XXXIII

19 At the February 2, 1993 hearing Siri C. Nelson, Deputy District Counsel appeared for  
20 the U.S. Army Corps of Engineers (Corps) subpoena witness Ronald Klump, an enforcement  
21 officer for the Corps.

22 XXXIV

23 Nelson moved for an order of the Board requiring Mallis to pay witness fees and  
24 limiting the examination and testimony of Klump, an employee of the Corps, or an alternative  
25 motion for the Board to quash the subpoena.

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2 XXXV

3 The Board having previously adopted the Superior Court Rules, ordered the appellant  
4 to pay Klump's witness fees and travel expenses.

5 XXXVI

6 Klump's testimony was inconclusive. He said that the project appeared to be  
7 waterward of the OHWM. However, he clarified this comment by attesting that you would  
8 have to look behind the outer rocks to determine if the main structure protruded farther  
9 waterward than the original rockery. However, no one removed the outer rock to prove this  
10 point.

11 XXXVII

12 Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such.  
13 From these Findings of Fact, the Board issues these:

14 CONCLUSIONS OF LAW

15 I

16 The Board has jurisdiction over this appeal. 90.58 RCW and 173-17 WAC .

17 II

18 The Board concludes that the project in question is located on the bank of Big Creek, a  
19 shoreline of the state, which is in the shoreline jurisdiction of Lewis County, State of  
20 Washington.

21 III

22 The remaining issues in this case are: (1) whether the project is a substantial  
23 development consistent with the Lewis County Shoreline Master Plan (LCSMP) and  
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1  
2 RCW 90.58.140; whether the penalty of one thousand dollars (\$1,000) was properly imposed;  
3 and is the project constructed more waterward of the OHWM than the rocks that had been  
4 placed there by the previous owner.

5 IV

6 Through Mallis's own admittance, the total cost of the project on a fair market value  
7 exceeds two thousand, five hundred dollars (\$2,500), and he did not obtain the necessary  
8 shoreline permit or permits.

9 V

10 The Board concludes that the project constitutes development under the LCSMP and  
11 RCW 90.58.030 and .140. However, the Mallises were confused and frustrated over the  
12 mixed signals that they received from County, State and Federal Authorities, and they thought  
13 their project was reconstruction of an existing rockery

14 VI

15 The Board finds that the confusion may have been compounded by the following:

16 1. A site visit from Zengel in June, 1991;

17 2. Lewis County's Order to Cease and Desist, June 20, 1991;

18 3 Mallises' appeal to the Order and a follow-up site visit by Zengel, a SCS official  
19 and a building official from Lewis County in July, 1991; followed by a Lewis County  
20 Amended Order issued August 1991, determining that the project could be left in place with  
21 more rip-rap placement and the planting of willow cuttings within the area; and

22 4. Site Inspections and discussions with representatives from the U.S. Corps of Army  
23 Engineers, Washington State Department of Wildlife, County officials, and DOE officials.

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2 VII

3 There is no question that larger quarry rock and cement were used to replace a rockery  
4 of smaller rocks that was built by the Kloidas in the middle seventies.

5 However, whether the project extends more waterward of the previously placed rocks,  
6 is not conclusive. The burden of proof is with respondents Lewis County and DOE, and they  
7 did not present conclusive evidence in this issue. Testimony conflicted.

8 VIII

9 Moreover, testimony that the Federal Emergency Management maps showed a bulge  
10 around the same vicinity that presently juts out toward the water leaves reasonable doubt that  
11 the structure does interfere with the normal flow of public waters in Big Creek. (Finding of  
12 Fact XXXII.)

13 IX

14 Zengel's final testimony also leaves doubt that the structure is substantially waterward  
15 of the OHWM, as well as the Corps of Army Engineers' Enforcement officer, Ron Klump.  
16 (Finding of Facts XXXII and XXXVI.)

17 X

18 Based on the foregoing, uncertainty of this issue, the evidence was not conclusive  
19 enough to find that the Mallises constructed waterward of the OHWM, and removing it may  
20 have more adverse effect on the environment than leaving it in place.

21 XI

22 However, the Board concludes that a project of this magnitude requires the approval of  
23 Lewis County pursuant to the LCSMP and the SMA and this has not been approved to date,  
24 because the project was constructed without a permit. Therefore, the civil penalty is justified  
25 under the provisions of RCW 90.58.210 and the LCSMP.

1  
2 XII

3 Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such.  
4 From the foregoing, the Board issues this:  
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**ORDER**


The Board hereby affirms the one thousand dollar (\$1,000) civil penalty for constructing a development within the shoreline designation of Lewis County in the State of Washington without the necessary shoreline permits, and remands this case back for application and county processing.

DONE this 26th day of March, 1993.

**SHORELINES HEARINGS BOARD**

  
ANNETTE S. MCGEE, Presiding

  
HAROLD S. ZIMMERMAN, Chairman

  
ROBERT V. JENSEN, Attorney Member

  
DAVE WOLFENBARGER, Member

  
BOB PATRICK, Member

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